General of Inland Revenue, Malaysia v. *Weng Lok Mining Co. Ltd.*;[7] *Government of Malaysia* v. *D.C.*[8] and *Comptroller-General of Inland Revenue* v. *N.P.*[9]) in which it has been held that the effect of the relevant provisions of the Income Tax Act, 1967 is that on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the Government by civil proceedings as a debt due to the Government. On such civil proceedings being brought by the Government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

In *Comptroller of Income Tax* v. *R.S.T.*[4] Tan Ah Tah J. said at page 217:—

"It was contended by counsel for the defendant that certain triable issues had been raised and that therefore the defendant should have been given leave to defend this action. One of these issues was said to be whether or not the sums on which tax is now claimed represent chargeable income which is taxable or capital assets not subject to taxation. On this point it is sufficient to say that it is eminently a matter for the determination of the Board of Review which was constituted under the Income Tax Ordinance to determine, *inter alia*, questions of that very nature."

In *Comptroller of Income Tax* v. *A. Co. Ltd.*[5] Choor Singh J. summed up the law in such lucid terms that I need no more than echo the following words of his Lordship with which I respectfully agree:

"In my opinion, once the Comptroller of Income Tax has made an assessment and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned in the notice, the taxpayer is bound by law to pay such tax within one month even though he may be dissatisfied with the assessment. Whether the assessment is right or wrong, the tax must be paid notwithstanding any objection or appeal. The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the comptroller to review and revise the assessment made upon him. If the comptroller refuses to amend the assessment, the aggrieved taxpayer may appeal to the Board of Review appointed under section 78 of the Ordinance and the board may, after hearing the appeal, confirm, reduce, increase or annul the assessment or make such order thereon as to it may seem fit. The taxpayer or the comptroller may then appeal to the High Court from the decision of the board upon any question of law or mixed law and fact. A taxpayer has no right to by-pass the Board of Review and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review. The provisions of Order XIV of the Rules of the Supreme Court must be read together with the provisions of the Income Tax Ordinance. If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of the tax. The proper course for every aggrieved taxpayer is to pay his tax and present his arguments against the assessment made upon him before the Board of Review."

In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

Ong Hock Sim F.J. concurred.

Appeal dismissed.

Solicitors: *Gibb & Co.*

RE KATHIRAVELU DECD.; SUNDARI v. PEMUNGUT DUTI HARTA PESAKA TANAH MELAYU

[O.C.J. (Abdul Hamid J.) October 15, 1973]
[Kuala Lumpur — Originating Petition No. 2 of 1973]

Estate Duty — Policies of assurance effected by deceased for benefit of wife — Whether moneys received or receivable are liable to estate duty — Civil Law Act, 1956 (Act 67), s. 23(1) — Estate Duty Enactment, 1941, ss. 4 and 5.

Insurance — Effected for wife's benefit — Whether liable to estate duty.

The deceased had taken out policies of assurance with two insurance companies for the benefit of his wife. The question which arose was whether estate duty was leviable on the moneys received or receivable under the policies of insurance.

Held: (1) the policies in this case was effected for the benefit of the wife and came within section 23 of the Civil Law Act;

(2) in the case of the first policy it was effected less than five years before his death and moreover the property retained by the wife was not such as to exclude the deceased of any interest as the deceased had the right under the policy to assign, charge, surrender or otherwise deal with the policy without the consent of the beneficiary;

(3) in the case of the second policy, although it was effected more than five years before the death of the deceased, it was quite clear that all rights privileges, and options under the contract were reserved for the deceased alone;

(4) the moneys received or receivable under the assurance policies were therefore not exempted from payment of estate duty.

Cases referred to:

(1) *Partington* v. *A.G.* (1869) L.R. 4 H.L. 100 at p. 122.
(2) *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921] 1 K.B. 64 at p. 71.
(3) *Re Fleetwood's policy* [1926] Ch. 48; [1925] All E.R. Rep. 262.
(4) *Re Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 T.L.R. 213.

ORIGINATING PETITION.

V. C. George for the petitioner.

Siti Norma Yaakob (Senior Federal Counsel) for the respondent.

Abdul Hamid J.: The petitioner Sundari d/o Krishnan, the executrix of the estate of S. Kathiravelu, deceased is asking the court to determine whether estate duty is leviable on moneys received or receivable under certain policies of assurance effected by her husband the deceased.

The facts are not in dispute. S. Kathiravelu effected two assurance policies on his life, one with the Great Eastern Life Assurance Company and the other with the American International Assurance Company.

Sundari the deceased's wife was named beneficiary under the policies.

Mr. V. C. George counsel for the petitioner contended that by reason of section 23 of the Civil Law Act, 1956 (Act No. 67), the moneys do not form part of the estate of the deceased. He also said that subsection (vi) of section 5 of the Estate Duty Enactment No. 7 of 1941 could not apply as it conflicts with section 23 of the Civil Law Act. Section 23(1) of the Civil Law Act which is in *pari materia* with section 11 of the Married Women's Property Act, 1882 reads as follows —

"23. (1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts."

In regard to section 11 of the Married Women's Property Act, 1882, may I refer to *Houseman's* Law of Assurance by Holder, 7th ed., page 154 where it is stated that —

"The purpose of section 11 of the Married Women's Property Act, 1882, are:—

1. to create trusts of life policies in cases where, apart from the Act, they would not be created, and
2. to give special protection against creditors."

At page 155 there is also this passage which reads as follows —

"It should be noted:—

1. That the policy will create a trust whether it contains a reference to the Act or not.
2. That the fact that the policy will not in certain events form part of the estate of the insured does not mean that it will be exempt from estate duty."

In the light of what I have just read it seems abundantly clear that section 23 of the Civil Law Act was enacted with a view to achieving the same purpose and producing the same effect. It would therefore mean that the provisions of the legislation governing estate duty will have to be examined to decide whether estate duty is leviable on the money received or receivable under such a policy.

In England, estate duty is imposed by the Finance Act, 1894 in respect of deaths occurring on or after August 2, 1894. This Act remains the basis of the present day levy of estate duty. The provisions, however, have been substantially amended from time to time. In this country, the provisions governing the levy of estate duty are contained in the Estate Duty Enactment No. 7 of 1941.

Section 4(i) of the Enactment provides that —

"4. (i) In the case of every person dying after the commencement of this Enactment, there shall ... be levied and paid upon the principal value, ascertained as hereinafter provided of all property settled or not settled which passes on the death of such person a duty called 'estate duty' at the graduated rates set forth in the Schedule to this Enactment."

The relevant portion of section 5 of the Enactment provides that —

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say —
....

(vi) Money received under a policy of assurance effected by the deceased on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by the deceased for such benefit;"

Before I proceed to construe the relevant provisions of the Estate Duty Enactment, it should, I think, be borne in mind that the Enactment is a taxing statute and, as in construing any other Act of Parliament, the words must be read and their meaning ascertained. Lord Cairn in *Partington* v. *A.G.*[1] said —

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

Rowlatt J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*[2] said —

"... Nothing is to be read in, nothing is to be implied; one can only look fairly at the language used."

May I also quote the following passages from *Beattie's* Elements of Estate Duty, 7th ed. at pages 8 and 9 which read —

"Although the general canons of construction apply to taxing statutes, as to others, yet the Crown must show that the tax is imposed by the Act. The result is that if there is an ambiguity, so that there is doubt whether tax is attracted or not, the doubt must be resolved in favour of the subject. Nevertheless, too wide or fanciful a construction must not be given to the maxim that clear words are necessary in order to tax the subject; there is to be no discrimination against the Crown. If, on a fair interpretation of words which are difficult to construe, it appears that the intention of the legislature was to impose tax, the court must give effect to that intention.

The rule that the burden of establishing liability is on the Crown does not apply when the subject is seeking the benefit of an exemption from tax which is otherwise plainly imposed. The onus is on the subject to show that his case falls within the terms of the exemption."

First of all, I propose to examine the position of an assurance policy effected under section 11 of the Married Women's Property Act in relation to estate duty under the Finance Act, 1894. It is summarised in *Beattie's* Elements of Estate Duty at page 109 and page 110 as follows —

"A policy of assurance is a contract between the assured and the insurance company. A third party for whose benefit a contract is made obtains no rights under that contract. If the insurance company contracts with the assured to pay the policy moneys to his nephew, for example, the nephew will obtain no right. Enforceable rights can be given to the intended beneficiary if (i) the assured became a trustee of the policy for the beneficiary, either by virtue of section 11 of the Married Women's Property Act, 1882, or by express declaration of trust, or (ii) the assured assigned the policy to the beneficiary or to a trustee for the beneficiary.

Under section 11 of the Married Women's Property Act, 1882, a policy of assurance effected by a man on his life, and expressed to be for the benefit of his wife, or his children, or his wife and children, or any of them, creates a trust in favour of the objects therein mentioned. The position is the same where a woman takes out a policy for the benefit of her husband or children. The assured or his personal representatives are trustees of the policy unless and until some other trustee is appointed. The trusts operate from the inception of the policy."

In England, the policy money is deemed to be property passing on the death under paragraph (c) of section 2(1) of the Finance Act, 1894. Included in

this paragraph are *donatio mortis causa*, gifts *inter vivos* and joint tenancies. In regard to estate duty there is this passage in *Beattie's* Elements of Estate Duty page 109 which reads as follows —

"Policies of life assurance may attract estate duty on a death under one or other of the following provisions of the Finance Acts:—

(i) section 2(1)(a) of the Finance Act, 1894, on a policy of assurance forming part of the deceased's estate;

(ii) section 2(1)(c) of the Finance Act, 1894, on a policy which formed the subject of a gift *inter vivos* made by the deceased;

(iii) Any head of liability to duty where the policy is an asset, like any other asset, passing on death, whether the death is that of the life assured or any other person.

A policy of life assurance may fall together outside any charge of duty, or may come within the terms of an exemption, in respect of the death."

It would seem that a policy which formed the subject of a gift *inter vivos* made within 7 years before the death of the donor is liable to estate duty on his death and in the case where gift was made 7 years before the death of the deceased if the donee did not assume and retain possession and enjoyment of the property comprised in the gift to the entire exclusion of the donor and of any benefit to him by contract or otherwise the gift attracts estate duty whenever the donor dies. This liability can be avoided notwithstanding retention of a benefit by the donor at the time of the gift, if possession and enjoyment is subsequently assumed by the donee to the donor's entire exclusion at least 7 years before his death.

Section 2(1)(c) is somewhat similar to subsection (iii) of section 5 of our Estate Duty Enactment. The subsection speaks of gifts that constitute property passing on the death of the deceased. Subsection (iii) of section 5 of the Estate Duty Enactment reads as follows —

"(iii) Property taken as *donatio mortis causa* made by the deceased, or taken under a disposition made by the deceased purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise which shall not have been *bona fide* made five years before the death of the deceased, or taken under a gift whenever made of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:

Provided...."

Now, under the Estate Duty Enactment, there is a specific provision to the effect that policy money is deemed to be property passing on death. The money under such policy would therefore attract estate duty unless it is exempted under the provision under the Enactment. In this regard, section 13 of the Estate Duty Enactment would appear to be pertinent to the case under consideration. Section 13 deals with exceptions from property passing or deemed to pass. Subject to certain provisos the section reads as follows—

"Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person ... under a disposition made by the deceased more than 5 years before his death where possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise:"

In the light of this section, I am of the view that the position regarding policy money effected under section 23 of the Civil Law Act is the same as in England. Such policy money would not by reason of section 13 of the Estate Duty Enactment attract estate duty if the person seeking the benefit of the exemption of tax can establish that the requirements of that section are fully complied with.

I shall now turn to consider whether in the present case the money received or receivable under the two policies effected by the deceased would attract estate duty. First of all, I would with respect say that I disagree with the suggestion by Mr. George that subsection (vi) of section 5 of the Estate Duty Enactment conflicts with section 23 of the Civil Law Act and has no application to the present case. Plainly section 23 of the Civil Law Act has been enacted for purposes I mentioned earlier. It deals with disposal and devolution of property. The effect of the provision is to exclude money received or receivable under such a policy from forming part of the deceased estate. For estate duty purposes, it has to be determined in the light of the provisions contained in the Enactment.

As for the present case, the court must in the first place be satisfied that the disposition came within the scope of section 23 of the Act. The onus is on the wife to establish that the following requirements have been satisfied —

(a) it was a policy effected by the deceased on his own life;

(b) the policy was a policy of assurance of life; and

(c) the policy was expressed to be for her benefit.

In regard to (a) and (b), these are not in dispute. As for (c), however, it would seem that there should be clear expression to the effect that the policy was for the benefit of the wife. However, it has been said that it is sufficient if the policy is expressed to be payable to the beneficiaries without using the words "for the benefit of." (See *Houseman's* Law of Life Assurance page 159). At page 161 it is stated as follows —

"A policy expressed to be for the benefit of or to be payable to a named wife without further words will give her a vested interest in the whole policy."

Assuming for a moment that the policies under consideration were policies properly effected under and came within section 23 of the Civil Law Act, then, clearly, trusts are created for the benefit of the wife. No special appointment of a trustee has to be made because under subsection (4), such policy shall in default of an appointment vest in the insured and his or her personal representatives in trust for the benefit of the wife. The mere fact that a trust has been created however, is insufficient to hold that the money received under the policy shall not attract estate duty. To avoid estate duty, it is for the wife to show that —

(1) The property was held by the deceased as trustee;

(2) The disposition of the property was made by the deceased more than 5 years before his death;

(3) That she *bona fide* assumed possession and enjoyment of the property immediately upon the creation of the trust; and

(4) Following the creation of the trust the property was retained by her to the entire exclusion of the

deceased or that the property retained must be such as to exclude the deceased of any interest either under a contract or otherwise.

In order to determine whether the requirements are complied with, the policies of assurance must be looked at. In the case of the policy effected with the Great Eastern Life Assurance Company, the wife was named beneficiary except that the words "for the benefit of" were not used. She was to receive the money under the policy in the event of her surviving the assured. Some options were reserved for the assured and by its terms it would also seem that the wife's interest was also of a contingent character. Although the words "for the benefit of" were not used and that by its terms the benefit would be derived in a certain event only and such benefit is of a limited or contingent character, it does not, to my mind, prevent the policy from being a policy effected under section 23 of the Act. (See *Fleetwood's Policy, Re*,[3] where *Re Equitable Life Assurance Society of the United States and Mitchell*[4] was applied).

Nonetheless, it is clear that estate duty is leviable in regard to money received or receivable under the policy. The policy was effected on August 4, 1966 and the deceased died about three and a half years later on March 19, 1970, that is, within 5 years from the date the policy was effected. Furthermore, it is abundantly clear that under the policy, the property retained by her was not such as to exclude the deceased of any interest. During his life time the deceased had the right under the policy to assign, charge, surrender or otherwise deal with the policy without the consent of the beneficiary.

As for the policy effected with the American International Assurance Company on October 8, 1964, the petitioner was named beneficiary and I am satisfied it was a policy effected for the benefit of the petitioner and came within section 23 of the Civil Law Act. However, it is quite clear that all rights, privileges and options under the contract with the company are reserved for the deceased alone. These include the right to take loan, surrender the policy, assignment and so forth. It is therefore clear that the property retained by her was also not such as to exclude the deceased of any interest during his life time.

For reasons that I have stated, I would therefore dismiss the claim.

Claim dismissed.

Solicitors: *Ng Ek Teong & Partners.*